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No. 81-6908

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINEETEEN HUNDRED AND EIGHTY-TWO

**Elwood C. Barclay,**

Petitioner,

-v-

**State of Florida,**

Respondent.

On Writ of Certiorari To
The Supreme Court of Florida

# BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE WHERE THERE WERE NO MITIGATING CIRCUMSTANCES TO BE WEIGHED AGAINST OTHER PROPER AGGRAVATING CIRCUMSTANCES.

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## OPINIONS BELOW

The original opinion of the Supreme Court of Florida is reported as Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978). The opinion remanding the case to the trial court for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977), is reported as Barclay v. State, 362 So.2d 657 (Fla. 1978). Following the hearings in the trial court, appeal was taken to the Florida Supreme Court and the decision of that court is reported as Barclay v. State, 411 So.2d 1310 (Fla. 1981), reh.denied, April 14, 1982.

## JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 4, 1981, reh. denied, April 14, 1982. The petition for certiorari was filed on June 16, 1982, and

granted on November 8, 1982. ___ U.S. ___, 51 U.S.L.W). 3362 (No. 81-6908). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves the following provisions of the statutes of the State of Florida which were in effect at the time of petitioner's trial: Fla.Stat. §§ 782.04, 921.141. Both statutes are reproduced in the appendix to petitioner's brief and need not be repeated here.

## STATEMENT OF THE CASE

### A. History of the Case.

On September 26, 1974, petitioner and three others were charged by grand jury indictment with the June 17, 1974 murder of Stephen Orlando (R Vol.I, p. 1).[1] On February 19, 20, 1975, the jury was selected for the trial of petitioner and his codefendants. The jury was made up of both men and women, blacks and whites. Petitioner was convicted of murder in the first degree.

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1/ References are to the record on appeal filed in the Florida Supreme Court. The symbol "R" is used to designate references to the record proper. The symbol "Pre-T" is used to designate references to the 4 volumes of pretrial proceedings. The symbol "JS" is used to designate references to the four volumes of jury selection proceedings. The symbol "Tr." is used to designate references to the 12 volumes of trial proceedings. The symbol "Post-Tr." is used to designate references to the 3 volumes of post-trial proceedings. The reference symbols in each case be followed by appropriate volume and page number.

A bifurcated sentencing hearing was held on March 5, 1975 (Post-Tr.Vol.I), and the jury returned an advisory sentence of life imprisonment for petitioner (R Vol.I, p. 186). However, the trial judge did not follow the jury's recommendation of life imprisonment but sentenced him to death by electrocution. The factual basis for the trial judge's decision listing both aggravating and mitigating circumstances appears in the Sentence (R Vol.II, pp. 217-247).

On direct appellate review, the Florida Supreme Court affirmed petitioner's conviction and sentence of death. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978). Subsequent to this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), the Florida Supreme Court remanded the case to the trial court for a hearing at which

petitioner was to be afforded the opportunity to rebut any information contained in the presentence investigation report, whether in the confidential portion of the report or any other part. Barclay v. State, 362 So.2d 657 (Fla. 1978). Following the hearings in the trial court, the Florida Supreme Court again affirmed the trial judge's imposition of the death sentence. Barclay v. State, 411 So.2d 1310 (Fla. 1981), reh.denied, April 14, 1982. A petition for certiorari was filed on June 16, 1982, and granted on November 8, 1982.

**B. Statement of the Facts**

On Sunday, June 16, 1974, William Lee Hearn was playing basketball in a park in Jacksonville, Florida (Tr.Vol.VII, p. 1351) when he was confronted by Jacob John Dougan, Jr., petitioner's codefendant, and asked if he had his gun (Tr.Vol.VII,

p. 1353). It was at this point in time that Hearn, petitioner, and codefendant Dougan, along with codefendants Evans and Crittendon, all black males, began the first event that lead to the murder of Stephen Orlando. Dougan advised everyone to go home and change into dark clothes (Tr.Vol.VII, p. 1355) and then for everyone to meet at petitioner Barclay's house (Tr.Vol.VII, p. 1357). They were to proceed from there.

Hearn brought his .22 caliber pistol (Tr.Vol.VII 1355, 1356), and petitioner Barclay brought his pocketknife (Tr. Vol.VII, p. 1357). Dougan took possession of the pistol and gave directions where to go (Tr.Vol.VII, p. 1358). After two stops in Jacksonville, it was apparent to the rest of the group what Dougan and petitioner were planning. When the group first stopped, Dougan wrote a note which read:

> Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.

(Tr.Vol.VII, p. 1359; R Vol.II, p. 222) At the next stop, Dougan stated the plan, "catch a white devil and kill him and leave the note on him." (Tr.Vol.VII, p. 1361) All parties agreed to this plan and evidenced their agreement by their participation in the subsequent events (Tr.Vol.VII, p. 1362-1392).

The group then drove through Jacksonville seeking out a victim. After a few abortive attempts, they left the downtown area and headed toward the beach. Upon arriving in Jacksonville Beach, a young white male was seen hitchhiking and was picked up by the group (Tr.Vol.VII, pp. 1369, 1370). The

hitchhiker identified himself as Stephen. Hearn who was driving the car took a southerly direction along the ocean. Although the hitchhiker Steven said he wanted to stop on 12th Street (Tr.Vol.II, p. 137), Dougan had Hearn to continue going south under the pretext that they were to meet a girl with drugs (Tr.Vol.VII, p. 1372).

The car continued following its southerly course until Dougan had Hearn drive on to a dirt road. After reaching a dead-end of trash, the car was turned around and stopped. Stephen, the hitchhiker, was ordered out of the car and when he got out attempted to run but was stopped by Dougan who hit him in the back with a .22 pistol (Tr.Vol.VII, pp. 1377-1382). Petitioner Barclay and codefendant Evans then dragged Stephen to the back of the car where Dougan and petitioner threw

him down to the ground. Petitioner Barclay then proceeded to stab Stephen repeatedly while he was on the ground and all the while Stephen was begging for mercy (Tr.Vol.VII, p. 1385; Vol.VI, p. 1019). Dougan then shot Stephen in the head twice with Hearn's .22 caliber pistol and, had not the gun jammed, would have shot him several more times (Tr.Vol.VII, pp. 1386-1389; Vol.VI, p. 1019). Petitioner Barclay and codefendant Evans then attempted to stick the note written earlier by Dougan into Stephen's chest with the pocketknife (Tr.Vol.VII, pp. 1387- 1391; Vol.VI, p. 1017). Petitioner Barclay and codefendants Dougan, Evans, and Crittendon, along with Hearn, all left the scene of the murder in Hearn's car and returned home (Tr.Vol.VII, pp. 1391, 1392).

On June 18, 1974, the body of Stephen Orlando was examined by a physician who

testified that there were multiple stab wounds to the chest, stomach, and back, a total of 12 wounds (Tr.Vol.I, pp. 125-129; Vol.II, p. 1318). There were two bullet wounds to the head, the bullets entering the left ear and left cheek. Death resulted from the bullet entering the left ear (Tr.Vol.I, p. 133; Vol.VII, p. 1318).

Subsequently, after requesting permission from a friend, petitioner Barclay and codefendants made taped recordings of the murder at the friend's house (Tr.Vol.V, p. 946; Vol.VII, p. 1398). On Wednesday, June 19, 1974, petitioner Barclay and codefendants Dougan, Crittendon, and Evans, Hearn, and friends Otis Bess and Eldridge Black met at Jim Mattison's house and made five taped recordings describing the murder of Stephen Orlando (Tr.Vol.V, pp. 947-950; Vol.VII, p. 1398; Vol.VII, p. 1403). The taped

recordings were graphic depictions of the events surrounding Stephen Orlando's death. The tapes contained statements of alleged racial inequality in America and called for a revolution of blacks against whites. Here, in the tapes, petitioner Barclay and his codefendants labeled themselves as the Black Liberation Army. (The tapes were transcribed in their entirety and are found at Tr.Vol.VI, pp. 1014-1043). These tapes implicating petitioner Barclay and codefendants in the murder of Stephen Orlando were sent to various radio and television stations in the Jacksonville area, the victim's mother, and two area police stations (Tr.Vol.II, pp. 382-397; Vol.III, pp. 408-416, 455; Vol.V, p. 950; Vol.VI, p. 1181). At trial, there was testimony by friends of petitioner Barclay and codefendant Dougan that most of the tapes were made by

petitioner Barclay and Dougan and that it was their voices on the tapes (Tr.Vol.V, pp. 951- 953; Vol.VI, pp. 1004-1008, 1181). (See also the transcription of the tapes at Tr.Vol.VI, pp. 1021-1031; 1040-1043).

Along with the tapes explaining petitioner Barclay's involvement in the murder of Stephen Orlando, both petitioner and codefendant Dougan made statements to friends admitting their part in the crime (Tr.Vol.VI, pp. 1182-1184; Vol.VII, pp. 1254-1258, 1399). Also witnesses had seen petitioner and the other participants in the murder in possession of the .22 caliber pistol that was used to murder Stephen Orlando. At trial, there was testimony that Vivian Carter had thrown the murder weapon, along with another gun, into a creek in Jacksonville. The Jacksonville Sheriff's office recovered the same guns

from the creek (Tr.Vol.III, pp. 530-540). The weapons were sent to the F.B.I. and it was established that the .22 caliber shell casing found at the side of Stephen Orlando's body (Tr.Vol.II, p. 291) came from William Hearn's .22 pistol (Tr.Vol.VIII, p. 1548).

Petitioner Barclay was tried for the murder of Stephen Orlando, along with codefendants Dougan, Crittendon, and Evans in February-March of 1975. The prosecution presented the testimony of 29 witnesses, including that of eyewitness William Hearn who turned state's evidence after pleading guilty to second degree murder (Tr.Vol.VII, pp. 1348, 1349). Many exhibits were admitted into evidence by the trial judge, including the murder weapon, photographs of the body, the scene of the crime, the note found on the murder victim, exemplars of codefendant Dougan's handwriting, the

pocketknife used by petitioner Barclay to stab the victim, and the numerous tapes made by the group describing the murder and calling for a revolution of blacks against whites.

A jury returned verdicts of guilty of murder in the first degree as to both petitioner Barclay and codefendant Dougan (R Vol.I, pp. 179, 180). Following a bifurcated hearing held on March 5, 1975, the jury after deliberating approximately twenty minutes returned with a recommendation of life imprisonment for petitioner Barclay and death for his codefendant Dougan (R Vol.I, pp. 185, 186). On April 10, 1975, the trial judge pronounced the sentence of death on both petitioner and codefendant Dougan and gave his reasons and factual bases therefor in the Sentence (R Vol.II, pp. 217- 247; Post-Tr.Vol.II, pp. 77-109).

## SUMMARY OF ARGUMENT

### A. Florida Supreme Court's Standard of Review

In its review of death penalty cases, the Florida Supreme Court logically assumes that where there are multiple statutory aggravating circumstances and no mitigating circumstances, the weighing process would have reached the same outcome even had the sentencing court not considered an aggravating circumstance found impermissible. This standard of review is well illustrated in Ford v. State, 374 So.2d 496 (Fla. 1979), cert.denied, 445 U.S. 972 (1980), where the court had this to say:

> Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty. Elledge v. State, 346 So.2d 998 (Fla. 1977); State v. Dixon, supra.

Id. at 503. See also Shriner v. State, 386 So.2d 525 (Fla. 1980), cert.denied, 449

U.S. 1103 (1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919 (1979); and Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912 (1980). Dobbert is interesting. There, the Florida Supreme Court held that the trial judge improperly found two aggravating circumstances. But since there were no mitigating circumstances, a reversal of the death sentence was not required. Note the following:

> Since there are one or more validly found aggravating circumstances and no mitigating circumstances, a reversal of the death sentence is not necessarily required. Elledge v. State, 346 So.2d 998 (Fla. 1977); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

Id. at 1071. It is submitted that the Florida Supreme Court's standard of review has achieved the goals of rationality, consistency and fairness enunciated in Proffitt v. Florida, 428 U.S., at 258-60, and Furman v. Georgia, 408 U.S. 238 (1972).

**B. Application of Harmless Error Rule**

More than thirty years ago the Florida Supreme Court held that the harmless error rule was applicable in capital cases. North v. State, 65 So.2d 77 (Fla. 1952). Consequently, it is nothing new for the Florida Supreme Court to apply the harmless error rule in appropriate circumstances, even in death cases. Two recent examples of the application of the rule are found in Ferguson v. State, 417 So.2d 631 (Fla. 1982), and Ferguson v. State, 417 So.2d 639 (Fla. 1982). Indeed, although couched in different language, the Florida Supreme Court applied the harmless error rule in Dobbert v. State, supra. See also the remarks of Chief Judge Godbold, dissenting in part and specially concurring in part, in Ford v. Strickland, ___ F.2d ___ (11th Cir. 1983) No. 81-6200, opinion filed January 7, 1983, en banc, approving the

application of the harmless error rule by the Florida Supreme Court, quoted infra.

### C. The Rejection of Alleged Mitigating Circumstances

The consideration of aggravating and mitigating factors are factual matters which the Florida Supreme Court will not disturb unless there is an absence or lack of substantial competent evidence to support those findings. In Mikenas v. State, 407 So.2d 892 (Fla. 1981), in answer to a defendant's argument that the trial judge should have considered certain testimony as a mitigating circumstance, the court had this to say:

> The testimony was apparently permitted by the trial court in an abundance of fairness to defendant, but the court was not required to give it weight as a mitigating circumstance.

Id. at 893. This procedure was followed in Dobbert v. State, supra, where the court

rejected a contention that the trial court should have found certain mitigating circumstances and held that the trial judge did not err in his determination that there were no mitigating circumstances.

### D. Florida's Achievement of a Rational, Consistent and Fair Sentencing Procedure

The Florida death penalty statute was carefully drafted to meet the requirements articulated by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and that effort was rewarded by this Court's stamp of approval in Proffitt v. Florida, supra. To ensure that a trial judge had all relevant necessary evidence for individualized sentencing in capital cases, the legislature in § 921.141(1) provided in pertinent part as follows:

> In the Proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include

> matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Florida's death penalty statute complies with the sentiments expressed in Gregg v. Georgia, 428 U.S. 153 (1976), where this Court indicated that before a death sentence may be imposed, the attention of the sentencing authority must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime.

The construction put upon Florida's death penalty statute is found in State v. Dixon, 283 So.2d 1 (Fla. 1973), where the court pointed out that when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence

unless it or they are overridden by one or more of the mitigating circumstances provided in the statute and that all evidence of mitigating circumstances may be considered by the judge or jury. It is significant that to this date the Florida Supreme Court's construction of this state's death penalty statute has not been challenged, much less overturned. It is submitted that the Supreme Court of Florida is the ultimate authority on Florida law and its interpretation of state statutes should not be questioned. Tennon v. Ricketts, 574 F.2d 1243, 1245 (5th Cir. 1978), cert.denied, 439 U.S. 1091 (1979); Wainwright v. Stone, 414 U.S. 21 (1973).

**E. A Search for Reasonableness**

In McGautha v. California, 402 U.S. 350 (1971), this Court rejected a claim that a bifurcated trial and the submission of

specific aggravating or mitigating circumstances to the jury were requirements under the United States Constitution. A little more than a year later, the Court handed down Furman v. Georgia, 408 U.S. 238 (1972), which resulted in confusion among courts, legislatures, as to what was required to impose the death penalty in conformance with the Constitution. Four years later, the confusion was to some degree clarified by Gregg v. Georgia, 428 U.S. 153 (1976). But since Gregg, the Court has continued to periodically modify its view as to what is constitutionally required to impose the death sentence, steadily placing new areas and issues of capital sentencing procedure under the umbrella of constitutional "due process," voiding new state statutes and releasing more condemned criminals from their sentence in the process. The term

"finality," as explicated in United States v. Frady, ___ U.S. ___, 71 L.Ed.2d 816, 102 S.Ct. ___ (1982), is meaningless in death penalty litigation and has been relegated to a status of judicial limbo.

It is submitted that we cannot continue to steep capital defendants in unduly expansive procedural protections. At some point, it must be acknowledged that the torturous procedural path of capital cases does more to undermine the criminal justice system and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. At some point, hopefully, it should be admitted that the people of the State of Florida are also entitled to due process of law. Stein v. New York, 346 U.S. 156, 197 (1953).

## ARGUMENT

**THE FLORIDA SUPREME COURT PROPERLY UPHELD PETITIONER'S DEATH PENALTY BECAUSE IT WAS BASED ON PROOF BEYOND A REASONABLE DOUBT OF MULTIPLE AGGRAVATING CIRCUMSTANCES AND THERE WERE NO MITIGATING CIRCUMSTANCES.**

### A. Florida Supreme Court's Standard of Review

The thrust of petitioner's argument is that the trial judge erred in considering a non-enumerated statutory aggravating circumstance for the purpose of showing the nonexistence of a statutory mitigating circumstance. It was necessary to consider petitioner's prior criminal record because unless the existence of this mitigating circumstance was negated, then there would be a presumption that petitioner had not engaged in any previous criminal activity. The Florida Supreme Court's position is stated in Booker v. State, 397 So.2d 910 (Fla. 1981), cert.denied, 102 S.Ct. 493:

There were no mitigating circumstances to be weighed against the aggravating circumstances. The defendant's reliance on Elledge v. Stste, 346 So.2d 998 (Fla.1977), is misplaced because the record reveals that the trial court did not take into account in the "weighing process" any conceivable non-statutory aggravating circumstances. The questions posed to the defendant during cross-examination were used to negate a mitigating circumstance, i.e., that defendant had a significant history of prior criminal activity. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Knight v. State, 338 So.2d 201 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976). When the defendant elects to testify during the sentencing proceedings, it is appropriate for the prosecutor to cross-examine him concerning previous criminal activity. Unless this mitigating factor is negated, there would be a presumption that defendant had not engaged in any previous criminal activity. It is apparent from an examination of the findings of the court that this evidence was not considered as an aggravating factor. The principles announced in Elledge, supra, and Mikenas v. State, 367 So.2d 606 (Fla. 1978), are not applicable.

397 So.2d, at 918. However, the trial judge in his Summarization of Aggravating Elements did conclude that petitioner's criminal record was an aggravating circumstance (J.A. 120, 121)[2].

Petitioner correctly cites Mikenas v. State, 367 So.2d 606 (Fla. 1978), for the proposition that a substantial history of prior criminal activity is not an aggravating circumstance under the Florida death penalty statute. But this isn't the end of the matter; it's just the beginning. In Mikenas, the court remarked as follows:

> In capital cases, it is this court's responsibility to ensure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes, in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating

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2/ The sentence of petitioner is accurately reproduced in its entirety in the joint appendix, pp. 82-141.

> circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. It was not done in this case. A substantial history of prior criminal activity is not an aggravating circumstance under the statute. Since mitigating circumstances are present, Elledge, supra, dictates resentencing.

Id. at 610. A brief discussion of Elledge v. State, 346 So.2d 998 (Fla. 1977), will be helpful. What mandated the result reached in Elledge was from the record before it the Florida Supreme Court could not determine whether the trial judge had permitted a statutory mitigating circumstance to be offset by a nonstatutory aggravating circumstance. But in the instant case, the trial judge found that there were no mitigating circumstances. Therefore, there could be no danger of a nonstatutory aggravating circumstance

offsetting a statutory mitigating circumstance in the weighing process. The Elledge court did not condemn the use of nonstatutory aggravating circumstances as long as they were not used by the trial judge in offsetting statutory mitigating circumstances.

As recently as July 15, 1982, the Florida Supreme Court in Ferguson v. State, 417 So.2d 639 (Fla. 1982), reaffirmed the principle that nonstatutory aggravating circumstances do not necessarily invalidate the sentence when no mitigating circumstances are found. Please note:

> Our negation of two of the aggravating circumstances found by the trial court would not change the result of this case in the absence of mitigating circumstances for there remain four valid aggravating circumstances. In such cases, a reversal of the death sentence would not necessarily be required, as any error that occurred in the consideration of the two inapplicable aggravating circumstances was harmless. See

> Shriner v. State, 386 So.2d 525 (Fla.1980), cert.denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 289 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 101 S.Ct. 3000, 64 L.Ed.2d 862 (1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); and Elledge v. State, 346 So.2d 998 (Fla. 1977). (Emphasis supplied)

Id. at 646.

Indeed, in Ferguson v. State, 417 So.2d 631 (Fla. 1982), a case involving the same defendant as in Ferguson, 417 So.2d 639, but different murders, the court pointed out that the trial judge had erroneously found as an aggravating circumstance that the defendant was under a sentence of imprisonment at the time that he committed the crime. The court pointed out that although the defendant was serving a two-year period of probation which followed an eighteen-month period of incarceration, he was not confined in prison at the time, nor

was he supposed to be. The court reiterated the principle that persons who are under an order of probation but not imprisoned at the time of the offense do not fall within thr phrase "person under sentence of imprisonment" as set forth in § 921.141(5)(a), F.S. In treating the error of the trial judge in basing the death sentence at least in part on an improper aggravating circumstance, the court remarked as follows:

> Our negation of said aggravating circumstance would not, however, change the result of this case in the absence of mitigating circumstances. In such cases, a reversal of the death sentence is not necessarily required, as any error that occurred in the consideration of the inapplicable aggravating circumstances was harmless. See Shriner v. State, 386 So.2d 525 (Fla.1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979); cert.denied, 447 U.S. 912, 101 S.Ct. 3000, 64 L.Ed.2d 862 (1980). (Emphasis supplied)

Id. at 636.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court specifically held that the use of nonstatutory aggravating circumstances do not necessarily render a death sentence unconstitutional. The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has a propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly, through his intentional act created a great risk of serious bodily harm and death to many persons.

Id. at 246. This is particularly interesting because the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute [§ 921.141, F.S. (1975)]. See Proffitt,

428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The conclusion is unmistakable that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty.

Back to Elledge v. State, supra: Again, the court was there confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally permissible. The court then engaged in an exhaustive analysis of Proffitt, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circum-

> stances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis the court's.]

Elledge, at 1002, 1003. Consequently, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of statutory aggravating circumstances and the absence of mitigating circumstances renders unimportant the existence of nonstatutory aggravating circumstances. Neither following petitioner's original trial in February-March, 1975, nor at the conclusion of the hearing mandated by Gardner v. Florida, supra, did the trial judge find any mitigating circumstances. It bears repeating that the sentencing findings of the trial judge were in both instances approved by the Florida Supreme Court. Barclay, 343 So.2d 1266 and 411 So.2d 1310.

**B. Application of Harmless Error Rule**

In holding as it did in Elledge v. State, supra, and many other cases, that the use of some nonstatutory aggravating circumstances does not require a reversal for a new sentencing hearing as long as there is no danger that those circumstances have not served to overcome the mitigating circumstances in the weighing process, the Florida Supreme Court applied the harmless error rule in refusing to order a resentencing. Indeed, in the two Ferguson cases (417 So.2d 631 and 417 So.2d 639), the application of the harmless error rule is clear. In the very recent case of Ford v. Strickland, ___ F.2d ___ (11th Cir. 1983) No. 81-6200, opinion filed January 7, 1983, Chief Judge Godbold, dissenting in part and specially concurring in part, remarked as follows:

As Zant v. Stephens, 72 L.Ed.2d 222 (1982), suggests, we must initially ask what the Florida Supreme Court's actions mean as a matter of state law. I interpret the Florida Supreme Court to apply a harmless error rule in refusing to order resentencing. The presumption, cited by the Florida court here, that death is appropriate where some aggravating and no mitigating circumstances are present cannot constitute a hard and fast rule of law. The Florida Supreme Court permits the trial judge and jury to forego the death sentence in just such circumstances. See Williams v. State, 386 So.2d 538, 543 (Fla. 1980). The presumption must therefore constitute a harmless error rule that operates only where the initial sentencer has misapplied the sentencing statute. [footnote omitted] . . .

The Florida Supreme Court's actions, so interpreted, pass constitutional muster in this case. See Zant v. Stephens, 72 L.Ed.2d 222, 235 (1982) (Powell, J., dissenting) ("I would leave open -- also for the Supreme Court of Georgia to decide -- whether it has authority to find that the instruction was harmless error beyond a reasonable doubt"); Drake v. Zant, 449 U.S. 999 (1981) (White, J., dissenting to denial of cert.) ("Nor do I believe that the Constitution requires the

Georgia Supreme Court to vacate the sentences if it fails to sustain the Godfrey aggravating circumstance. The cases now before us involve only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing."). As a matter of general constitutional policy I think it essential that appellate courts be able to employ a harmless error rule where the initial sentencer has found aggravating circumstances to so clearly outweigh mitigating circumstances by such a definitive margin. Otherwise the resultant procedural maze can be expected to subvert the judicial process in cases where the death sentence is imposed.

* * * * *

Some have interpreted the requirements that the jury's discretion be channeled by adequate standards and that the sentence be rationally reviewed to imply that the trial judge and jury in every case must properly apply the statutory standards. See Zant v. Stephens, supra at 228 (Brennan & Marshall, JJ., dissenting; Westbrook v. Balkcom, 449 U.S. 999 (1981) (Stewart, J., dissenting to denial of cert.); Judge Kravitch's dissenting op. at 36-38; Judge Johnson's dissenting op. at 5-6. I cannot agree. The requirements of adequate standards and rational

> review do not possess an immutable meaning that judges can immediately discern; they must be interpreted in light of their dual purposes of insuring reliable and consistent application of the death penalty. Use of a harmless error here rule [sic] frustrates neither purpose. Greater inconsistency is not a danger because the Florida Supreme Court's affirmance is based on the same discretion channeling standards that the jury and judge would use in resentencing the defendant. Presumably the Florida Supreme Court will apply its harmless error rule with an eye towards consistency. Use of a harmless error rule does not risk greater unreliability because the Florida Supreme Court bases its harmless error decision on the same evidence that the trial judge and jury would use on remand.

Id. at 4-7. In the instant case, no evidence considered was inappropriate for consideration. The sentencing judge's erroneous classification of part of that evidence as an aggravating circumstance permitted by the statute should not constitutionally infect the sentence. Again, and this time terminally, in the

instant case there were no mitigating circumstances and the five statutory aggravating circumstances found by the trial judge were upheld by the Florida Supreme Court on two occasions. In so doing, that court logically reasoned that the weighing process would have reached the same outcome even had the sentencing court not found the aggravating circumstance now challenged in this proceeding.

It is noted that the plurality opinion does not fault Chief Judge Godbold's premise that the Florida Supreme Court applied the harmless error rule. Note the following:

> In setting out the state law premise for the presumption that Ford's death sentence should be affirmed due to the existence of five statutory aggravating circumstances and no mitigating circumstances, we noted that the Florida Supreme Court considered whether the sentence would have been different had the sentencing judge found only the five

> aggravating circumstances upheld on appeal. The effect of such an evaluation seems very like the application of a harmless error rule. Therefore, we adopt Chief Judge Godbold's opinion as an alternative ground insofar as it is consistent with the reasoning set forth above.

Id. at 13A.

Application of the harmless error rule is nothing new in this jurisdiction. See North v. State, 65 So.2d 77, 95 (Fla. 1952).

### C. Rejection of Alleged Mitigating Circumstances

The tenor of petitioner's brief is that the trial judge committed egregious error in finding from the evidence presented that multiple statutory aggravating circumstances had been proven beyond a reasonable doubt, and, of course, in failing to find any mitigating circumstance. This is understandable when viewed from petitioner's predicament. However, the

claim that a trial judge erred in failing to find certain mitigating circumstances has been previously made and rejected by the Florida Supreme Court. The case of Lucas v. State, 376 So.2d 1149 (Fla. 1979), is informative. There, the defendant produced a psychiatrist at the sentencing hearing who testified that the defendant suffered from a sociopathic personality resulting in defective judgment. Other witnesses testified to defendant's abnormal appearance and behavior on the evening of the shooting. It was urged that the trial judge erred in not finding that the defendant was under extreme mental or emotional disturbance at the time of the commission of the offense [§ 921.141(6)(b)] and could not appreciate the criminality of his conduct. [§ 921.141(6)(f)]. In rejecting this argument, the court stated that "[t]he jury and the judge heard the

testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result."

The same contention was made in Sireci v. State, 399 So.2d 964 (Fla. 1981), and again rejected by the court:

> He also says that the trial court improperly failed to consider certain mitigating factors. Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Id. at 971.

Again, in Mikenas v. State, 407 So.2d 892 (Fla. 1981), the court rejected the argument that certain testimony should have been treated as a mitigating circumstance. Please note:

> In relation to defendant's second point, defendant argues that the new testimony heard by the court was not considered properly in its findings. The testimony heard consisted of two psychologists concerning the possibility of defendant's rehabilitation and a minister con cerning his alleged progress in religion. Their testimony was not considered as a mitigating circumstance by the court. The testimony was apparently permitted by the trial court in an abundance of fairness to defendant, but the court was not required to give it weight as a mitigating circumstance.

Id. at 893.

Respondent agrees that this Court is familiar with the manner in which the Florida death penalty statute works and it does work in the way that it is supposed to. If it doesn't, then the Florida Supreme Court takes the necessary action to see that it does. For example, see Francois v. State, 407 So.2d 885 (Fla. 1981), where the court found that the trial court's sentencing errors resulted in the

recitation of three statutory aggravating circumstances that were not properly established by the evidence. Also, Ferguson v. State, 417 So.2d 631 (Fla. 1982), where the court remarked as follows:

> However, in our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.
>
> The judgment of conviction is affirmed. The death sentence is vacated and the cause is remanded to the trial court for the purpose of determining an appropriate sentence. An additional sentence advisory verdict by a jury is not required.

Id. at 638.

For the latest expression of the Florida Supreme Court, see Armstrong v. State, ____So. 2d _____(Fla. 1983), No. 61,871, opinion filed Jan. 20, 1983.

## D. Florida's Achievement of a Rational, Consistent and Fair Sentencing Procedure

The Florida death penalty statute was carefully drafted to meet the requirements articulated by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and in Proffitt v. Florida, supra, this Court put its unmistakable stamp of constitutional approval thereon. In an effort to ensure that a trial judge had all relevant evidence necessary for individualized sentencing in capital cases, the legislature in § 921.141(1) provided in pertinent part as follows:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).* Any such evidence

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*Since petitioner's trial, this sentence has been amended. It now provides:

> which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Thus, Florida's statute complies with the sentiments expressed in Gregg v. Georgia, 428 U.S. 153 (1976), where the Court indicated that before a death sentence may be imposed, the attention of the sentencing authority must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. In other words, the sentencing authority should have as much information before it as possible. Approximately two years later, this view was repeated in Lockett v. Ohio, 438 U.S. 586 (1978), as follows:

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> In the proceeding, . . . subsections (5) and (6).

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.

438 U.S., at 605.

The case of State v. Shaw, 255 S.E.2d 799 (S.Car. 1979), cert.denied, 444 U.S. 957, is informative. There, the prosecution was permitted, over appellants' objections, to introduce seven photographs in evidence at the penalty hearing. Appellants argued that the photographs should not have been admitted at the penalty hearing because post-mortem abuse is not a statutory circumstance of aggravation. The Supreme Court of South Carolina rejected this contention as follows:

> Appellants have misinterpreted the statutory complex.
>
> The General Assembly adopted this State's current death penalty

statutes in an attempt to comply with the guidelines laid down by the United States Supreme Court in Gregg. Perhaps the most emphasized of these guidelines is the need for an individualized sentence, considering both the circumstances of the crime and the individual defendant.

The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding. The pre-sentence hearing is for the introduction of additional evidence in extenuation, mitigation or aggravation of punishment. The statute does not exclude from the consideration of the sentencing authority any evidence received at the guilt determination stage. To the contrary, the sentencing authority is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with additional evidence, if any, in extenuation, mitigation or aggravation of punishment.

* * * * *

The evidence that Shaw committed acts of post-mortem abuse to Ms. Hartness's body was likewise admissible not only as a circum-

> stance of the crime, but also as evidence of Shaw's character. The acts of post-mortem abuse were of a violent sexual nature and bore a logical connection to the earlier rape of Ms. Hartness.
>
> The photographs depicting the post-mortem abuse to Ms. Hartness's body were properly admitted into evidence and considered by the sentencing authority, not as additional evidence in aggravation of punishment, but as evidence of the circumstances of the crime and the characteristics of the individual defendant Shaw. [Emphasis the courts.]

Id. at 806.

In the case of Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), en banc, the court held that where the jury imposed the death penalty after finding the presence of three aggravating circumstances, any one of which justified the penalty under Louisiana law, the Louisiana Supreme Court's review of the evidentiary sufficiency of only one of the aggravating circumstances was entirely proper. This is so because under

Louisiana law the state supreme court when sitting in review of capital cases was required to find the presence of at least one aggravating circumstance beyond a reasonable doubt. After pointing out that the two challenged aggravating circumstances did not suffer constitutional defects the court remarked as follows:

> Since the requisite one aggravating circumstance of murder in the course of an armed robbery is clearly present and was unanimously found by the jury, the other two circumstances are only material to deciding whether the aggravating and mitigating circumstances weighed together indicate the death penalty should be imposed.
>
> * * * * *
>
> . . . This speculation is beside the mark, however, because the meaningful portions of this verdict, (1) that at least one aggravating circumstance was present and (2) that under the totality of aggravating and mitigating circumstances the death penalty should be imposed, were the product of channeled discretion and are rationally reviewable.

> This Court's opinion in Stephens v. Zant, relied on so heavily by petitioner, is simply inapposite. We do not confront a facially unconstitutional aggravating circumstance and, therefore, we need not vacate the sentence given. . . .
>
> * * * * *
>
> . . . Irregardless of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one may properly serve as the basis for appellate affirmation of the death sentence. . . .
>
> The Louisiana Supreme Court's review of only one aggravating circumstance was entirely proper. We find no violation of either the Eighth or Fourteenth Amendment.

Id. at 389, 390.

The seminal case construing Florida's death penalty statute is State v. Dixon, 283 So.2d 1 (Fla. 1973), where the court's discussion of the statute reveals a striking similarity to the Louisiana statutory scheme. The court pointed out that when one or more of the aggravating

circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in the statute and that all evidence of mitigating circumstances may be considered by the judge or jury. Dixon, 283 So.2d, at 9. In the instant case, disregarding the alleged improper aggravating circumstance challenged by petitioner, there are an additional five statutory aggravating circumstances found by the trial judge to have been proven beyond a reasonable doubt and approved by the Florida Supreme Court. It is significant that at the conclusion of his summarization of the mitigating and aggravating circumstances, the trial judge specifically pointed out that petitioner Barclay had not presented any matters in his responses to the P.S.I. which mitigated the heinous, atrocious and

cruel nature of the crime (J.A. 134). The trial judge then concluded that there were sufficient and great aggravating circumstances which exist to justify the sentence of death as to petitioner Barclay (J.A. 135).

The discussion of lack of remorse in Sireci v. State, supra, provides an interesting comparison. The court there pointed out that while lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether the crime was especially heinous, atrocious, or cruel, citing Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert.denied, 428 U.S. 911 (1976), as authority for this holding. However, in the instant case petitioner challenges the trial judge's consideration of his prior criminal record. But we

wonder just how the trial judge could have determined the applicability of the mitigating circumstance of "no significant history of prior criminal activity" without considering petitioner's prior record. It is submitted that he had to do so in order to determine the existence vel non of the mitigating circumstance set forth in § 921.141(6)(a), F.S. (1981). Petitioner's prior criminal record was indeed relevant and necessary for the trial judge to make an informed decision. This is precisely the type of evidence that is admissible in a penalty hearing by virtue of the provisions of §921.141(1), hereinabove quoted in pertinent part. This is the kind of information a trial judge must have in order to tailor a sentence that will be individualized both as to the defendant and the circumstances of the crime. In petitioner's original appeal, 343 So.2d

1266, the Florida Supreme Court recited the applicable aggravating circumstances found by the trial judge as to petitioner's codefendant, Dougan. The court then stated that although petitioner had received a life recommendation from the jury, virtually the same considerations applied with respect to the consequences of the criminal episode. In agreeing with the trial judge's override of the jury recommendation, the court remarked as follows:

> When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail. In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld. Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being so nominal (a minor age difference but no suggestion of different maturities), the facts here do not warrant the

> dispensation of unequal justice. See Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975). "Equal Justice Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Barclay, 343 So.2d, at 1271.

The Florida Supreme Court over the years since this state's death penalty statute first became effective, December 8, 1972, has consistently made a concerted effort to see that even-handed justice is dispensed to every capital defendant. Illustrative of this, note the following quoted from the opinion in Walsh v. State, 418 So.2d 1000 (Fla. 1982):

> We find, however, that the trial court should have accepted the jury's unanimous recommendation of life imprisonment. This Court has

repeatedly held that the trial court and this Court must weigh heavily the sentencing jury's advisory opinion of life imprisonment. Tedder v. State, 322 So.2d 908 (Fla. 1975). We have allowed the trial court to overrule a life recommendation only where the facts justifying death are so clear and convincing that no reasonable person could differ. See Buford v. State, 403 So.2d 943 (Fla. 1981), cert.denied, ___ U.S. ___, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert.denied, ___ U.S. ___, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert.denied, ___ U.S. ___, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978); Douglas v. State, 328 So.2d 18 (Fla.), cert.denied, 429 U.S. 871, 97 S.Ct. 185, 50 L.Ed.2d 151 (1976). And we have reversed the death sentence and directed the trial court to impose life imprisonment where there was a reasonable basis for the jury's

recommendation. Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); McKennon v. State, 403 So.2d 389 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Shue v. State, 366 So.2d 387 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla.), cert.denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Thompson v. State, 328 So.2d 1 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975). In this cause, we conclude there was a reasonable basis for the jury's unanimous recommendation and the trial court should have followed that recommendation.

Walsh, 418 So.2d, at 1003, 1004. Based on the multiplicity of challenges of every conceivable nature and kind that have been hurled against those cases affirming the imposition of the death penalty, it must be apparent to this Court that the only time a capital defendant receives a fair and impartial trial is when he is acquitted.

Respondent's argument that the trial judge's consideration of a non-enumerated statutory aggravating circumstance did not vitiate petitioner's death sentence is based in substantial measure upon the nature of the process by which death sentences are imposed and upon the meaning of the term "aggravating circumstance." Under the laws of all thirty-five states

which currently have the death penalty,[3] a verdict of guilt as to a capital offense results in a separate hearing on the issue of punishment in which further evidence may be introduced by the parties. With regard to what evidence may be introduced by the prosecution at this punishment-phase hearing, the laws of the vast majority of states provide that such evidence is not limited to that required to establish the

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[3]/Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. See Gillers, "Deciding Who Dies," 129 U.Pa.L.Rev. 1, 101-119 (1980); and footnote 4, infra. State statutes which have been declared unconstitutional by the highest state court or which are manifestly unconstitutional under this Court's past decisions are excluded from this list. See, e.g., District Attorney v. Watson, 411 N.E.2d 1274 (Mass. 1980).

aggravating circumstance or circumstances submitted in the case, but may also include (varying with the language of each statute) the nature and circumstances of the offense, the character and background of the defendant, the prior convictions of the defendant, and any other matters relevant to sentencing.[4] This provision is both

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[4]/Ala.Code. tit. 13A, § 5-45(c) (1981 Supp.); Cal. Penal Code § 190.3 (1978 Supp.); Del.Code, tit. 11, § 4209(c) (1979); Fla. Stat. Ann. § 921.141(1) (1979 Supp.); Ga.Code.Ann. § 27-2503(a) (1977); Idaho Code § 19-2515(e) (1977 Supp.); Ky.Rev.Stat. § 532.025.1(a) (1976 Supp.); La.Code.Crim.Pro.Ann., art. 905.2 (1976 Supp.); Md.Ann.Code, art. 27 § 413(c) (1979 Supp.); Miss.Code.Ann., § 99-19-101(1) (1977); Mo.Rev.Stat. § 565.006.2 (1978); Mont.Rev.Code.Ann. § 46-18-302 (1977 Supp.); Neb.Rev.State. § 29-2521 (1979 Supp.); Nev.Rev.Stat. § 175.552 (1979); N.H.Rev.Stat., § 630.5(II) (1977 Supp.); N.M.Stat.Ann., § 21-20A-1(C) (1979 Supp.); N.D.Gen.Stat. § 15A-2000(a)(3) (1978); Ohio.Rev.Code.Ann., § 2929.03(D)(1) (effective 10-19-81); Or.Rev.Stat. § 163.116(1) (1979); 42 Pa.Cons.Stat.Ann., § 9711(a)(2) (1981 Supp.); S.C.Code § 16-3-20(B) (1978 Supp.), as construed by State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 805-

reasonable and consistent with the decision of this Court in Gregg v. Georgia, 428 U.S. 153 (1976):

> We have long recognized that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender" . . .. Otherwise, "the system cannot function in a consistent and a rational manner." [Citations and footnote omitted.]

Gregg, 428 U.S., at 189. See also Id., 428 U.S. at 203-204. The necessity of individualized sentencing based upon a

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806 (1979), cert.denied 444 U.S. 957 (1979); S.D. Codified Laws Ann., § 23A-27A-2 (1979), Tenn.Code.Ann., §39-2404(c) (1981 Supp.); Tex.Code.Crim.Proc.Ann., Art. 37071(a) (1981 Supp.); Utah.Code.Ann. § 76-3-207(1) (1978); Va.Code.Ann. § 19.2-264.4(B) (1980 Supp.); Wyo.Stat. § 6-4-102(c) (1977). Contra: Ariz.Rev.Stat.Ann. § 13-703(C) (1979 Supp.); Ark.Crim.Code. § 41.1301(4) (1977); Colo.Rev.Stat. § 16-11-103(2) (1979 Supp.); Conn.Gen.Stat.Ann., § 53a-46a(c) (1980 Supp.); Ill.Ann.Stat., ch. 38, § 9-1(e) (1973); Ind.Code.Ann. § 35-50-2-9(d) (1973); Okla.Sta.Ann., tit. 21, § 701.10 (1976 Supp.); Wash.Rev.Code. Ann. § 10.94.020(4) (1977).

broad range of evidence receives even greater emphasis in Woodson v. North Carolina, 428 U.S. 280, 303-305, (1976); and Lockett v. Ohio, 438 U.S. 586, 602-606 (1978).

On the basis of the evidence before it, the sentencing authority (trial judge in Florida) must take at least two actions in rendering a verdict as to punishment. First, it must make a specific written finding that at least one statutory aggravating circumstance is established by the evidence, thus creating the possibility that the death sentence may be imposed.[5]

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[5]/Some states impose additional requirements, such as that the sentencing authority specify any mitigating circumstances if found, e.g., Md.Ann.Code., act. 27 § 413(j) (1979 Supp.); or that a finding be made of the defendant's future dangerousness, e.g., Tex.Code.Crim.Proc.Ann., Art. 37.071(b) (1973). The above generalizations as to the sentencing process do not apply to Texas and the two other states which employ the Texas system of capital

(cont'd on next page)

Second, given that the death penalty may be imposed, the sentencing authority must decide whether this sentence should be imposed and then impose either a sentence of death or a lesser punishment. This provision is characterized by many statutes as determining whether "the aggravating circumstances outweigh the mitigating circumstances." § 921.141(3), F.S. (1981); Cal. Penal Code § 190.3 (1978 Supp.). See also Ala.Code, tit. 13A, § 5-47(e) (1981 Supp.); Ind. Code Ann. § 35-50-2-9(e) (1973); Mo. Rev. Stat. § 565.012.1 (1978); 42 Pa. Cons. Stat. Ann. § 9711(e)(1) (1981 Supp.).

From the above facts, it is apparent that the term "aggravating circumstance,"

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sentencing. Ore.Rev.Stat. § 163.116 (1979); Va.Code.Ann. § 19.2-264.4 (1980 Supp.). See Jurek v. Texas, 428 U.S. 262, 269-274 (1976) for an explanation of that system.

as used in most state statutes, has two entirely different meanings according to the context in which it is used. The first (and arguably more accurate) meaning of "aggravating circumstance" is the legal conclusion the sentencing authority must derive from the evidence in order to even consider the possibility of a death penalty. For example, if the prosecution seeks the death penalty on the theory that the murder was committed after the defendant had escaped from a lawful place of confinement, the jury or trial judge must review the evidence and determine whether this statutory element is present. If the sentencing authority does not make the necessary legal conclusion that this or some other statutory aggravating circumstance is present, the defendant is entitled to a sentence of imprisonment as a matter of law. The second meaning often

given the term "aggravating circumstance," particularly apparent in the statement that the aggravating and mitigating circumstances are "weighed" to determine punishment, is the evidence in aggravation which is before the sentencing authority. The jury or trial judge does not weigh the statutory language of the aggravating and mitigating circumstances, it weighs the evidence which aggravates or mitigates the murder committed. Any contrary interpretation of "aggravating circumstance" in this context, requiring the sentencing authority to consider only the statutory language instead of the facts, would be irrational, nonenforceable, and directly contrary to the requirement that the sentencing process take into the account the individual facts relating to each crime and defendant. Lockett v. Ohio, supra, 438 U.S., at 602-606; Gregg v. Georgia, supra, 428 U.S., at 197-198.

These principles clearly indicate the answer to the issue at bar. The sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing process, whether the death penalty may be imposed; the sentencing authority must review the evidence before it and conclude whether any of the statutory categories is present. As pointed out in Gregg v. Georgia, supra, 428 U.S., at 188-198, this requirement serves to "limit" and "channel" the discretion of the trial judge (under Florida law) in making the sentencing decision. Once this determination is made, i.e., that at least one aggravating circumstance has been proven beyond a reasonable doubt, the issue is whether the death penalty should be imposed, and the language of the statutory aggravating circumstances has nothing to do with this question--rather, this decision

is made by the sentencing authority based upon the evidence before it. Since statutory aggravating circumstances operate only to open the door to consideration of the death penalty, and since any one such circumstance will perform this function, regardless of the presence or absence of others, the invalidity or impropriety of any aggravating circumstance found by the sentencing authority would impermissibly taint the sentence of death only if the invalid or improper aggravating circumstance was the only aggravating circumstance found (thus entitling the defendant to a lesser sentence as a matter of law).

This reasoning is inherent in the decisions of Florida and several other states which have considered the present issue. For example, the Georgia courts have repeatedly held that a death sentence

based upon multiple aggravating circumstances will death stand even if some of the circumstances are set aside. As stated in Burger v. State, 265 S.E.2d 796 (1980), cert.denied, 446 U.S. 988 (1980),

> Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance, or in this case two, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon.

(Citations omitted.) 265 S.E.2d, at 800.

Respondent is cognizant of the holdings of this Court in Stromberg v. California, 283 U.S. 359 (1931); Yates v. United States, 354 U.S. 298 (1957); Street v. New York, 394 U.S. 576 (1969); and Bachellar v. Maryland, 397 U.S. 564 (1970). However, in all of these decisions (all relating to the statutory abridgement of First Amendment rights), the Court held that where a jury returns a general verdict of guilt in a

criminal prosecution, and where one of several statutory bases for the conviction is unconstitutional, the conviction must be reversed because it cannot be determined whether or not the verdict rested upon the unconstitutional ground. See Stromberg v. California, supra, 283 U.S., at 267-268; Bachellar v. Maryland, supra, 397 U.S., at 570-571.

Had the trial judge in the instant case imposed the death sentence without specifying what statutory aggravating circumstances had been found to permit such a sentence (assuming arguendo this would have been possible under Florida law), then petitioner's thesis might have at least colorable merit. But such was not the case. In addition to the challenged aggravating circumstance which the trial judge had to consider, he specified in writing at least five other statutory

aggravating circumstances, reciting the facts in support thereof. The impropriety of the one aggravating circumstance does not in any manner change the fact that five other valid statutory aggravating circumstances were found to have been proven beyond a reasonable doubt, nor does it alter in the slightest the evidence which was properly before the jury in the punishment phase. While the merits of petitioner's argument (assuming arguendo the existence of merit) have not been adjudicated by this Court, it has received the attention of least one Justice; in the denial of certiorari in Drake v. Zant, 449 U.S. 999 (1980), Justice White, dissenting from the denial of certiorari, stated that

> The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either Stromberg v. California, [supra], or Street v. New York, [supra].

> The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.

Drake v. Zant, 449 U.S., at 1003. For the reasons enunciated above, respondent concurs in this conclusion.

**E. A Search for Reasonableness**

Approximately twelve years ago, this Court in McGautha v. California, 402 U.S. 350 (1971), rejected the claim that a bifurcated trial and the submission of specific aggravating or mitigating circumstances to the jury were requirements under the United States Constitution. Speaking for a majority of the Court (the last time for nine years that this would occur in a death penalty case), Justice Harlan stated that:

> The Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of the students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. [Citation omitted.]

402 U.S., at 221. Thirteen months after McGautha, this Court radically changed its view in Furman v. Georgia, supra, a decision which resulted in confusion among courts, legislatures, and learned authorities as to what was required to impose the death penalty in conformance with the Constitution. Four years later, at an untold cost in legislative and judicial resources, this confusion was to some degree rectified by Gregg v. Georgia, supra, and its accompanying cases. Since Gregg, however, this Court has continued to periodically modify its view as to what is constitutionally required to impose the

death sentence, steadily placing new areas and issues of capital sentencing procedure under the aegis of constitutional "due process," voiding new state statutes and releasing more condemned criminals from their sentence in the process. Coker v. Georgia, 433 U.S. 584 (1977); Lockett v. Ohio, supra; Green v. Georgia, 442 U.S. 95 (1979); Godfrey v. Georgia, 446 U.S. 420 (1980), Beck v. Alabama, 447 U.S. 625 (1980); Estelle v. Smith, 451 U.S. 454 (1981); Bullington v. Missouri, 451 U.S. 430 (1981). By constantly expanding the principles laid down in the five death penalty cases decided in 1976, this Court has led at least one United States Court of Appeals judge to suspect that "the Court is in process of hedging this penalty about with such obstacles that, as a practical matter, it cannot be carried out." Gibson v. Jackson, 578 F.2d 1045, 1051 (5th Cir.

1978) (Gee, Circuit Judge, specially concurring).

Whether or not such is the case, this Court's decisions from and after 1976 have collectively operated upon the state and federal court system to greatly assist in ensuring that sentences of death will not be carried out. This Court is the final authority on constitutional law, and lower courts and counsel must look to it in formulating analyses and approaches to novel issues in this field of law. The death penalty decisions of this Court have fostered two views: first, by its opinions and its recent history of dealings in this field, it has inadvertently promoted the implicit attitude, particularly in the federal judiciary, that death sentences should be invalidated upon any colorable theory which creates unease in the judicial mind. It may be said without intending any

disrespect to the lower courts involved, that this Court's decisions have reinforced and given legal substance to some judges' personal views on the death penalty, both those who privately oppose it and those who find it difficult or impossible to take the responsibility of upholding such a sentence in any case before them, no matter how constitutional or how justified.

The second signal implicitly sent from this Court by its recent course of decisions is to the convicted murderers on death row and their counsel. The defendants are unmistakably encouraged to litigate, relitigate, and then litigate again all conceivable theories relating to their convictions and sentences, in all courts possible and for as long as possible. Surely a condemned murderer has ample reason to believe from past history, that if he delays his execution for two,

five or ten years, this Court may eventually come up with a new doctrine which will retroactively vacate his sentence. In any event, given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial was not free from constitutional error. Both the case at bar and Jurek v. Estelle, 438 U.S. 586 (1978), demonstrate the success of such tactics. For example, in the instant case, at the time of petitioner's trial in February-March, 1975, the use of nonstatutory aggravating circumstances had not been withdrawn by the Florida Supreme Court. It was not until Purdy v. State, 343 So.2d 4 (Fla. 1977), was decided that the use of aggravating circumstances was restricted to those enumerated in the statute. Purdy was decided February 3, 1977, reh.denied, March

25, 1977; however, Barclay, 343 So.2d 1266, was decided March 17, 1977, reh.denied, Apr. 7, 1977. Therefore, at the time Barclay, supra, was decided, Purdy v. State, supra, was final. The only reasonable conclusion that can be drawn in this situation is that the Florida Supreme Court permitted Barclay's death sentence to stand because the trial judge found that five statutory aggravating circumstances had been proven beyond a reasonable doubt in addition to the single nonstatutory aggravating circumstance.

Following Barclay's evidentiary hearing pursuant to Gardner v. Florida, supra, he challenged the reimposition of the death sentence primarily by argument that the findings previously reviewed and affirmed by the Florida Supreme Court were in error. That court finding that the dictates of Gardner had been met and that

there was no defect in the original sentencing order, refused to accept Barclay's suggestion that it abrogate the law of the case. Barclay, 411 So.2d 1310.

Finally, the repeated statements that capital punishment is constitutional have begun to have a hollow ring as a practical matter. It is submitted that we cannot continue to steep capital defendants in unduly expansive procedural protections. At some point, it must be acknowledged that the torturous procedural path of capital cases does more to undermine the criminal justice system and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. A murderer may effectively challenge and re-challenge his death sentence on the same grounds again and again. As stated recently: "They can make these appeals in two state courts, and,

starting fresh, through the Federal system up to the Supreme Court." Newsweek. "The Mistress of Delay," Nov. 16, 1981, at 102-03. For those who argue that the imposition of the death penalty has not been an effective deterrent, respondent submits that if that is so, it is because of the continued delays in carrying out the sentence that has weakened its deterrent effect.

The petitioner did not receive a perfect trial. He will never receive a perfect trial in the courts of this state, or any other state. But he did receive a fair trial, and that's all the Constitution requires. Michigan v. Tucker, 417 U.S. 433 (1974).

## CONCLUSION

It is agreed that there are many regrettable aspects of life which influence deeds such as those for which petitioner was convicted and which resulted in the imposition of the death penalty against him; but insofar as this writer is able to judge, the denial of a fair trial, as the law in its present state can provide it, was not one of these.

Petitioner's death sentence resulted from a clearly-channeled, rationally reviewable exercise of discretion by the trial judge which was twice affirmed by the Florida Supreme Court. The judgment of that court affirming for the second time

petitioner's sentence of death should not be disturbed.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this _____ day of January, 1983, copies of this Brief for Respondent were mailed, postage prepaid, to Ms. Deborah Fins, Suite 2030, 10 Columbus Circle, New York, New York 10019, Attorney of Record; and to Mr. Kenneth Vickers, 437 East Monroe Street, Jacksonville, Florida 32202. I further certify that all parties required to be served have been served.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel for Respondent

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THE COURT: All right. Thank you.

In this case, nothing further legally having been brought to the attention of the Court concerning the imposition of this sentence, and having denied Mr. Vickers' motion, five years have passed since I last sentenced Mr. Barclay for murder in the first degree and I think it's necessary to briefly review what occurred in this case.

On September 26, 1974, the defendants, Elwood Clark Barclay, Jacob John Dougan, Dwayne Crittendon and Brad Evans were indicted for murder in the first degree in that they did on June 17, 1974, from a premeditated design to effect the death of Steven Anthony Orlando, did kill the said Steven Anthony Orlando by shooting him to death with a pistol. Crittendon and Evans were convicted of murder in the second degree and I sentenced each of them to a term of one hundred ninety-nine years in

the State Prison. Both Barclay and Dougan were convicted of murder in the first degree and I sentenced both of them to death.

This present case is one of the rarest types of crime to come before this Court or any court. The facts at trial prove that this was a premeditated racial hatred murder. The victim was chosen at random, stalked and brutally murdered only because he was defenseless and because he was of a different racial group than that of his murderers.

After the crime, tape recordings were made wherein Barclay and Dougan admitted the murder. They described the killing and the agony of the victim. These boastful tapes were cruelly made and sent to the mother of the murdered boy and to local TV and radio stations, bragging of the murder and announcing that it was the start of a

revolution and promised further violence. One of the tapes said, "White people, prepare yourself to die." It was a call for and an attempt to start a racial war. In my opinion, such ravings can only come from a depraved, homicidal mind.

Similar statements were violently uttered on another continent in our own recent history. During World War II I was among some of the first American combat infantry soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like chordwood [sic] to be buried or burned in the ovens. These people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of

the same crime: they were different from the people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime; they were different. Surely we must have learned something from that tragic holocaust.

Until the defendants were arrested five years ago, terror stalked the streets of this city, and it was only due to the good will of both black and white citizens that order prevailed and further violence and retaliatory acts were not committed. Nothing good has or ever will come from the murder of Steven Anthony Orlando, but the tragic slaughter of this eighteen year-old youth can be used as an example of the monumental stupidity of racial hatred murder.

The essential facts brought out in this trial were that the four defendants were

part of a group that termed itself the "Black Liberation Army", the "BLA", and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war. The testimony shows that on the evening of June 17, 1974, Barclay, Dougan, Crittendon, Evans and Hearn, set out in a car armed with a .22 caliber pistol and a knife with the intent to kill a devil, the devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them. As they drove around the City of Jacksonville they made several stops and observed a number of white persons as possible victims. At one stop Dougan wrote out a note which was to be placed on the body of the victim ultimately chosen for death.

Eventually, the five men headed for Jacksonville Beach where they picked up a

hitchhiker, eighteen year-old Steven Anthony Orlando. Against his will and over his protest, they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay struck the first homicidal blow by repeatedly stabbing him with a knife. Dougan then put his foot on Orlando's head and shot him twice. Crittendon and Evans played a lesser degree in the murder and were convicted of murder in the second degree.

The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note which was stuck to Orlando's body by the knife of the murderers read in part, "Warning to the oppressive state: We must destroy our enemy. Therefore, you must die. The revolution has begun." End of quotes.

After the murder, the defendants Barclay and Dougan, by their own admission

and supported by the testimony of other witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the mother of Steven Anthony Orlando and to the media. All of the tapes contained much of the same content and intent. The tapes read in part as follows: "Mary Ann Mallory" -- that was Orlando's mother -- "don't feel so bad. You haven't lost a son, you got a hero. Your son will go down in Black history. Steven Anthony Orlando was not murdered, by no means. He was given a fair trial. He was tried and found guilty and executed." Then Mr. Barclay and Mr. Dougan said, "The reason Steven was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed. You can tell it must have been made in American because it wasn't worth a" -- and I delete the expletive. "He was stabbed in the

back, in the chest and in the stomach. Ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes. He died in style, though, begging, begging, pleading for mercy." And the tapes ended with the words, "Your Black Liberation Army."

William Hearn, who was one of the five persons present at the murder of Orlando, testified at the trial that he witnessed the murder, and he told of the participation of Barclay, Dougan, Evans and Crittendon and Hearn, together with the witnesses Madison, Eldred Black and Otis Best, who all stated that they were present when the boastful tapes were made, and they identified the voices of Barclay and Dougan when the tapes were played to the jury during the trial. That jury, composed of both black and white citizens, found both

Barclay and Dougan guilty of murder in the first degree.

I have carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and I find nothing in such responses which mitigates any circumstance herein. I have prepared a thirty-five page sentence wherein all of the factors set forth in the statute have been analyzed and considered, and I conclude that the messages and the actions of Barclay and the other defendants were in all ways a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution. The defendant Barclay, together with the other defendants, premeditatedly stalked their victim and brutally murdered him. The victim's only

crime was the he was of a different racial group than that of his murderers. He in no way offended them, nor did he even know them before that fatal evening. The victim, Steven Anthony Orlando, was knocked to the ground and repeatedly stabbed by the defendant Barclay as he writhed in pain begging for mercy.

In addition to an unprovoked premeditated murder, it was a declaration of war against a racial group with the promise of more violence, death, and revolution to come. Such acts of Barclay and the other defendants were of the basest, most callous homicidal type and they shreik out for the severest punishment and the termination of the existence of the perpetrator. The passage of five years from the date of this murder until the date of this sentence has not diminished the nature of the crime. Steven Anthony

Orlando was murdered and he is still dead, and the call for bloodshed and revolution continued to echo.

There are sufficient and great aggravating circumstances which exist to justify the sentence of death as to the defendant Elwood Clark Barclay. I, like so many American combat infantry soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers, and I witnessed the concentration camps where innocent civilians, children, were murdered in a racial, religious and political war of extermination. To attempt in this country to initiate such a race war is too horrible to contemplate. Had this defendant and the other defendants been exposed to the carnage of the battlefields and the horrors of the concentration camps instead of movies, television programs and revolutionary tracts glorifying violence

and racial strife, then perhaps their thoughts and actions would have taken a less violent course.

Having set forth my personal experiences, it is understandable that I am not easily shocked or moved by tragedy, but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits his right to life, for certainly his life is no more sacred than that of the innocent eighteen year-old victim, Steven Anthony Orlando. Having adjudged Elwood Clark Barclay guilty of murder in the first degree, I hereby sentence him to death. I order that he be taken by the proper authorities to the Florida State Prison, and there kept in close confinement until the date of his execution be set, and on such day as set, he be put to death by

having electrical currents passed through his body in such amounts and frequency until he is rendered dead.

I advise the defendant that he has thirty days from today within which to take an appeal, and I hereby appoint Mr. Kenneth Vickers to represent him on such appeal.

May God have mercy upon your soul.

Count's in recess.